BEFORE THE

CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD

In the Matter of: **WAYNE FISHBACK,** Appellant vs. VENTURA COUNTY ENVIRONMENTAL HEALTH DIVISION, Local Enforcement Agency, Respondent	**BOARD STAFF REPORT** APPEAL OF DECISION BY VENTURA COUNTY HEARING OFFICER AFFIRMING CEASE AND DESIST ORDER ISSUED MAY 11, 2006 BY VENTURA COUNTY ENVIRONMENTAL HEALTH DIVISION AS THE LOCAL ENFORCEMENT AGENCY PUBLIC RESOURCES CODE § 45030 Date: December 6, 2006 Time: 1:30 p.m.

I

INTRODUCTION

Appellant Wayne Fishback ("Fishback"), proceeding under Public Resources Code ("PRC") § 45030, has appealed to the California Integrated Waste Management Board (the "Board") seeking the Board's review of the decision of the Ventura County Hearing Officer (the "Hearing Officer"), dated September 22, 2006, affirming the Cease and Desist Order (the "Order") issued to Fishback by Respondent Ventura County Environmental Health Division, serving as the local enforcement agency for Ventura County (the "LEA"). If the Board determines that the appeal raises substantial issues, the Board may uphold the decision of the Hearing Officer or, upon substantial evidence that the LEA's enforcement action was

inconsistent with the Integrated Waste Management Act (the "IWMA"), PRC 40000 et seq., the Board may overturn the decision of the Hearing Officer and direct that the LEA take the appropriate action. PRC § 45032(b).

The fundamental question Fishback raises in this appeal is whether the use, over a period of years, of substantial quantities of dirt, concrete, stucco and brick obtained from construction sites for purposes of erosion control in accord with local ordinances constitutes the disposal of solid waste for which a permit is required or is an activity requiring other regulatory oversight by the LEA pursuant to the IWMA. As will be shown, on the facts and circumstances of this case, the answer is yes.

This Staff Report first addresses the Board's decision to hear the appeal, then summarizes the relevant facts from which the dispute arose and the decision of the Hearing Officer. The Staff Report then presents staff's analysis of how statutes and regulations within the Board's jurisdiction apply to the facts of the matter and addresses the legal arguments raised by Fishback in the proceedings below. The Staff Report concludes with staff's recommendation.

This appeal is unique in that Fishback and the LEA have agreed to base their presentations to the Board solely on the evidence introduced in the hearing before the Hearing Officer and agreed to waive the briefing of the legal and factual issues being appealed. Accordingly, no new evidence will be no introduced at the Board's hearing. It is staff's understanding that Fishback and the LEA will not submit written briefs which outline their arguments, but will make their arguments orally at the Board's hearing. This Staff Report and the Administrative Record of the hearing before the Hearing Officer (consisting of Documents 1-7, which are incorporated herein by this reference) (the "Record") will be the only written materials available to the Board prior to the hearing. The Record is included as an electronic attachment to this Staff Report in the Board's agenda.

In addition to Fishback's appeal to the Board, which is addressed in this Staff Report, Fishback has asserted that the Board in this hearing should also determine whether the Hearing Officer had jurisdiction to consider Fishback's initial appeal. It is our view that the issue of the Hearing Officer's jurisdiction is not properly before the Board at this time. Staff will address that issue in a separate pleading.

The Board staff responsible for the preparation of this staff report are:

Michael Bledsoe, Legal Office
Howard Levenson, Deputy Director, Permitting and Enforcement Division
Mark DeBie, P&E
Suzanne Hambleton, P& E
Kathleen Oliver, P&E
Bill Marciniak, P&E

II

STATUTORY FRAMEWORK FOR APPEALS

If a party to an appeal before a local hearing panel is not satisfied with the results of the hearing, it may seek the Board's review. PRC § 45030(a). The Board then may respond in one of three ways:

1. Determine not to hear the appeal if the appellant has failed to raise substantial issues (PRC § 45031(a));
2. Determine to accept the appeal and decide the matter on the basis of the hearing panel record, the parties' written arguments, or both (PRC § 45031(c)); or
3. Determine to accept the appeal and hold a hearing on the matter (PRC § 45031(c)).

It has been the Board's practice in past proceedings, and it is staff's recommendation in this case, that the Board first consider whether the appellant has raised substantial issues, and, if so, to hear the matter immediately and decide it on the basis of evidence submitted and arguments presented to the Board at the hearing.

The evidence that the Board may consider in reaching its decision is limited only to evidence that is relevant and that, in the Board's judgment, should be considered to effectuate and implement the policies of the IWMA. PRC § 45032(a). As noted, in this case the parties

have agreed to restrict the evidence to that introduced at the hearing before the local Hearing Officer. Accordingly, the Board's task in this hearing is to evaluate the relevant evidence submitted to the Hearing Officer and to reach a decision that is consistent with, and helps carry out, the IWMA.

Based on the facts of the matter as set out in the Record, the evidence before it and the applicable law, the Board may uphold the decision of the hearing panel or may overturn it, directing that appropriate action be taken by the enforcement agency (the "EA"). PRC § 45032(b)(1). The Board may take subsequent action itself if the EA fails to carry out the action directed by the Board. PRC § 45032(b)(2).

After the hearing on the appeal has been completed, the Board must deliberate to determine its decision. The Board may conduct its deliberations in closed session, pursuant to an express exception to the State's open meeting procedures, provided at Section 11126(c)(3) of the Government Code.[1] In its discretion, however, the Board may elect to deliberate in public session.

It is the view of the Legal Office that deliberations such as these are best held in closed session. Although bound by the evidence and the law, Board members can more freely debate the merits of the various claims and arguments of the parties and how best to implement the policies of the IWMA in closed session than they can in open session. The presence of the parties, stakeholders, members of the general public and the press during the Board's deliberations could hinder the unfettered consideration of the evidence and the arguments of the parties. As just one example of this, it might be difficult in public for some Board members to

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[1] "Nothing in this article [the Bagley-Keene Open Meeting Act] shall be construed to do any of the following:...Prohibit a state body from holding a closed session to deliberate on a decision to be reached in a proceeding required to be conducted pursuant to Chapter 5 [the formal hearing procedures of the Administrative Procedures Act (the "APA")] or similar provisions of law." The Board's hearing is conducted under the informal procedures of the APA (see Gov't Code, § 11445.10, et seq.). PRC § 45030(e). Those informal procedures do not specify that deliberation shall occur in open court or in a public setting, hence do not conflict with the more specific provision in the Bagley-Keene Open Meeting Act. Indeed, the APA expressly provides that a statute applicable to a particular state agency prevails over a conflicting provision in the APA. Gov't Code, § 11415.20.

question the credibility of a witness or question the integrity of a document. Yet, that questioning could be important in reaching a sound, reasoned decision.

If the Board reaches its decision immediately following the hearing, it may announce the decision at that time, subject to the preparation of a subsequent written decision. If necessary, the Board may continue the hearing to entertain further argument or evidence, or may continue its deliberations until it can reach a decision.

The Board's decision in an appeal such as this is subject to review by the Superior Court in an administrative mandamus proceeding. PRC §§ 45040, 45042.

III

DOES THE APPEAL RAISE SUBSTANTIAL ISSUES?

The first issue before the Board is whether Fishback has raised "substantial issues" in his appeal. PRC § 45031(a). The phrase, "substantial issues," is not defined in the IWMA or in Board regulations. On its face, the common meaning of the words lead us to believe that the Legislature, in employing those words, simply meant that the matter being appealed to the Board has some import to the Board in carrying out its statutory duties under the IWMA, and is not a trivial matter, nor merely frivolous or patently without significance.

Fishback's appeal meets this threshold. In staff's view, Fishback has raised substantial issues in his appeal. His challenge of the Hearing Officer's decision centers on the application of the Board's regulations governing the disposal of Type A Inert Debris, a type of solid waste regulated by the Board's Construction and Demolition Waste and Inert Debris Disposal Regulatory Requirements (Title 14, California Code of Regulations ["CCR,"] §§ 17387-17390), when that material is used for the purposes of erosion control in compliance with local ordinances. In addition to how those regulations are to be applied, the appeal raises two fundamental questions: is the material in question "solid waste," and does its use in this particular manner constitutes the "disposal" of solid waste? Accordingly, under PRC Section 45031, it is appropriate that the Board consider the appeal, and staff so recommends.

IV

STATEMENT OF FACTS

The facts in this matter are those set forth in the Record. Fishback and his wife own or control about 120 acres of land in the Simi Hills area in Ventura County which they use for agricultural purposes, including cattle and horse breeding. Record, Document 3, Appellant's Brief, pp. 1, 3.[2] The land is mountainous and subject to landslides and erosion. Record, Document 7, Transcript of Administrative Hearing, July 20, 2006, p. 76. (See also, photo, "Exhibit 10f" at Record, Document 5, p. 3, which is attached hereto in Exhibit "A.") For purposes of erosion control, Fishback arranged for "dirt, fully cured concrete, stucco, and brick"[3] [4] that had been "salvaged" from construction sites to be deposited on his land in Ventura County. Record, Document 3, Appellant's Brief, p. 3. Apparently, most of the material used comes from the "demolition of patios, driveways, sidewalks or swimming pool excavations." Record, Document 3, Appellant's Brief, p. 13. The material does not appear to be processed in any manner before being used (other than the removal of unwanted materials, such as loose rebar).[5] Photographs taken during an inspection of a portion of the Fishback property on February 22, 2006 show concrete rubble as used in the erosion control work.[6] Record, Document 5, p. 4,

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[2] Each Document of the Record has been paginated by hand, beginning with page number one. All references to page numbers in the Record are to the handwritten page numbers.

[3] Fishback refers to these materials as "clean fill." See, e.g., Record, Document 3, Appellant's Brief, p. 3. This description, however, has certain legal connotations that beg the very question at issue in Fishback's appeal. Board regulations define the type of material (excluding the dirt) that Fishback is using as "Type A Inert Debris," which is the way we describe the materials in this Staff Report. See, Title 14, CCR, § 17388(k)(1).

[4] The Record discloses that the materials deposited at the Fishback property also included "uncontaminated asphalt and rubble," cast concrete products and cast clay products, all of which would likely be considered "Type A Inert Debris." (Title 14, CCR, § 17388(k)(1)). Record, Document 3, Appellant's Brief, p. 3 and Tab 9, pp. 181-195.

[5] Appellant's brief, dated July 17, 2006, submitted to the Hearing Officer contains notes from Mr. Fishback showing that unwanted materials, such as plant material, loose rebar and asphalt, were removed from the Type A Inert Debris before use in the erosion control work. See, e.g., Document 3, Appellant's Brief, Tab 9, pp. 173-180.

[6] The LEA states that "the photograph (i.e., 'Exhibit 10g') is representative of the material that Mr. Fishback has used on his property," and shows how the material has been used. Document 7, Transcript of July 20, 2006 Administrative Hearing, p. 40, ll. 19-20, and p. 42, ll. 1-2. Mr. Fishback states that the area shown in the

"Exhibit 10g." There was no evidence that the material was processed, for example, crushed, sorted and graded (except for the removal of unwanted materials), prior to deposition at the Fishback property.

Fishback had the work done after receiving advice from two civil engineering firms. Record, Document 3, Appellant's Brief, p. 3. The material in question is "Type A Inert Debris," as defined in Board regulations.[7] The work began sometime in the 2000 – 2003 period.[8] Record, Document 7, Transcript of Administrative Hearing, July 20, 2006, p. 75, ll. 21-23, p. 76, ll.12-13. Fishback did not accept any payment for the deposit of the Type A Inert Debris at the property. Record, Document 3, Appellant's Brief, p. 4.

During 2005 and 2006, numerous public agencies inspected the work at the Fishback property. Record, Document 3, Appellant's Brief, pp. 5-6. Apparently, the agencies' interest in the property was stimulated by citizens' complaints. Record, Document 3, Appellant's Brief, p. 4. With the exception of the LEA, the agencies did not find any violations within their jurisdiction. Record, Document 3, Appellant's Brief, p. 5.

It appears that the LEA learned of the possible illegal disposal at the Fishback property in December 2005. Record, Document 3, Appellant's Brief, p. 6. The LEA met with Fishback in January 2006 to discuss what appeared to be, based on preliminary information, Fishback's illegal operation of a solid waste disposal site on his property. Record, Document 3, Appellant's Brief, p. 5, and Tab 6, pp. 158-159. On February 22, 2006, the LEA inspected portions of the Fishback property, accompanied by two CIWMB staff (Kitty Oliver and Bill Marciniak) and

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photographs "had been worked on prior to…2004, and is going to be further covered (with dirt, presumably) and turned into pasture land. Document 7, Transcript of July 20, 2006 Administrative Hearing, p. 76, ll. 1-4.

[7] "Type A Inert Debris" includes nonhazardous and uncontaminated "concrete…, fully cured asphalt, crushed glass, fiberglass, asphalt or fiberglass roofing shingles, brick, slag, ceramics, plaster, clay and clay product." Title 14, CCR, Section 7388(k)(1).

[8] Note that Mr. Fishback testified that, with respect to the area shown in the photographs as Exhibits 10f and 10g (see Document 5, pp. 3-4), the work began somewhere in the 2000-2003 period. Record, Document 7, Transcript of

others. Record, Document 3, pp.5-6. Three photographs[9] (labeled "Exhibit 10f" and Exhibit 10g") taken during the inspection are attached as Exhibit "A." Record, Document 5, pp. 3-4.

The Record indicates that the LEA requested that Fishback submit information that might qualify the activity at his property as an Inert Debris Engineered Fill Operation.[10] The LEA asserts that it requested that information "on numerous occasions." Record, Document 6, LEA's Closing Brief, dated September 18, 2006, p. 14. However, Fishback did not submit the requested information. Id.

Based on the LEA's inspection and information provided by Fishback and his counsel and Fishback's failure to provide information that would establish his eligibility for an exemption as an Inert Debris Engineered Fill or for an EA Notification as an Inert Debris Engineered Fill Operation, the LEA ultimately determined that Fishback was operating an Inert Debris Type A Disposal Facility.[11] The LEA directed that Fishback obtain a Registration Tier Permit, as is required for that type of facility, and so notified him by letter dated April 4, 2006. Record, Document 3, Appellant's Brief, p. 6 and Tab 10, pp. 221-228. The LEA directed that Fishback submit an application for the permit by May 1, 2006. Record, Document 3, Appellant's Brief, Tab 10. p. 223.

When Fishback failed to submit the required application, the LEA on May 11, 2006 issued the Cease and Desist Order that is the subject of this appeal. Record, Document 2, LEA Response to Appeal Filed by Wayne Fishback, pp. 169-172. The Cease and Desist Order

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Administrative Hearing, July 20, 2006, pp. 75-76. In his verified Appellant's Brief, dated July 17, 2006, he alleged that he undertook the work in March 2005. Record, Document 3, Appellant's Brief, p. 3.

[9] Copies of the photographs are attached hereto as Exhibit "A."

[10] From the Record, it is impossible to tell how hard the LEA worked at trying to convince Mr. Fishback he might qualify his site as an Inert Debris Engineered Fill Operation. In a letter dated March 14, 2006, the LEA requested "[e]ngineering reports of relevant project activities," which could possibly justify an exemption or classification as an operation. Record, Document 2, LEA Response to Appeal by Wayne Fishback, dated June 6, 2006, Tab 9, p. 264. The LEA's April 4, 2006 letter to Fishback explained that his activities had been classified as an Inert Debris Type A Disposal Facility in part because he had not submitted documentation demonstrating that the necessary engineering oversight had been provided. Record, Document 2, LEA Response to Appeal by Wayne Fishback, dated June 6, 2006, Tab 3, p. 165.

directed that Fishback cease all activities on his property for which a solid waste facilities permit was required (i.e., the disposal of Type A Inert Debris) until he obtained a permit, cease accepting solid waste and fill material at his property, cease disposing solid waste and fill material, and cease covering solid waste or fill material with soil. Record, Document 2, LEA Response to Appeal Filed by Wayne Fishback, dated June 6, 2006, Tab 4, pp. 169-172.

V

DECISION OF THE HEARING OFFICER

The Hearing Officer upheld the Cease and Desist Order issued by the LEA. Notice of Decision, Record, Document 6, p. 21 (a copy of the decision is attached as Exhibit "B"). In his Notice of Decision, issued September 22, 2006, the Hearing Officer determined that Fishback allowed material from construction sites (that is, "dirt, stucco, brick, fully cured concrete and asphalt") to be deposited on his property. Record, Document 6, p. 21. Applying CIMWB regulations to Fishback's activity, as well as case law cited by Fishback, the Hearing Officer found that the materials in question were "solid waste," that Fishback was "disposing" solid waste on his property, that Fishback was not exempt from the Board's regulations as a transfer/processing facility, and that Ventura County's Hillside Erosion Control Ordinance ("HECO") and the Integrated Waste Management Act ("IWMA") were not mutually exclusive (i.e., compliance with HECO did not excuse Fishback from compliance with the IWMA's permitting requirements). Record, Document 6, pp. 21-23.

This is the decision that Fishback has challenged and requests that the Board review.

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[11] See Title 14, CCR, Sections 17388(m) and 17388.4.

VI

ANALYSIS AND ARGUMENT

A. APPLICATION OF BOARD REGULATIONS GOVERNING THE DISPOSAL OF INERT DEBRIS TO THE ACTIVITIES AT THE FISHBACK PROPERTY

In 2003, CIWMB adopted regulations governing the transfer and processing and disposal of construction and demolition debris and inert debris.[12] The regulations set out State minimum standards for handling and disposing these materials in order to encourage their recycling and reuse and to assure that their handling and disposal are conducted in such a manner as to protect the public health and safety and the environment. Title 14, CCR, §§ 17380.1, 17387.5. As is common with Board regulations generally, these regulations establish a comprehensive system of tiered permits and performance standards to provide an appropriate level of governmental oversight to a wide range of transfer/processing and disposal activities, as well as extensive exemptions to foster appropriate reuse and recycling of these materials.

The regulations applicable in this case are the "Construction and Demolition Waste and Inert Debris Disposal Regulatory Requirements" (Title 14, CCR, Article 5.95, §§ 17387 – 17390). Fishback is utilizing "Type A Inert Debris," which is a subset of "Inert Debris," in furtherance of erosion control. Title 14, CCR, § 17388(k) and subdiv. (k)(1). Fishback is disposing the Type A Inert Debris on his property, since he is not storing it for some further use in the future or for subsequent transfer. Title 14, CCR, § 17388(e); see also, PRC § 40192.[13]

The inert debris disposal regulations provide exemptions that must be examined for their application to the Fishback activities. Two are of particular interest. "Inert debris engineered fill

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[12] The "Construction and Demolition and Inert Debris Transfer/Processing Regulatory Requirements" govern the transfer and processing of the specified materials (Title 14, Article 5.9, CCR, §§ 17380 – 17386); the Construction and Demolition Waste and Inert Debris Disposal Regulatory Requirements" govern the disposal of the specified materials (Title 14, Article 5.95, CCR, §§ 17387 – 17390).

activities"[14] undertaken for construction projects are exempt if they have local permits and if they use only "uncontaminated concrete and/or fully cured asphalt which has been reduced in particle size to 2 inches or less as part of a recycling activity and conclude within two years from commencement." Title 14, CCR, § 17388.2(a)(2). They must also be designed by an engineer to meet certain standards. Id. Mr. Fishback's activities fail to satisfy the requirements that the fill activity utilize only processed concrete or asphalt and that the activity conclude within two years. It is unknown whether the engineering on the erosion control work would satisfy the regulatory requirements.[15]

The regulations also exclude "Inert Debris Engineered Fill Operations"[16] which conclude within one year of commencement and meet specified regulatory requirements. Title 14, CCR, §

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[13] "Disposal" means" the final deposition of solid wastes onto land." PRC § 40192(c).

[14] "Engineered Fill Activity" means fill that has been designed by an engineer to act as a structural element of a constructed work and has been placed under engineering inspection, usually with density testing. An engineered fill activity shall meet specifications prepared and certified for a specific project by a Civil Engineer, Certified Engineering Geologist, or similar professional licensed by the State of California, and includes requirements for placement, geometry, material, compaction and quality control." Title 14, CCR, § 17388(g).

[15] Fishback alleges that he "employed a civil engineering firm to design and inspect the [erosion control] work to insure that the grading met all applicable state and local laws." Record, Document 3, Appellant's Brief, p. 3. However, there was no evidence introduced in the hearing below as to whether the work met the engineering requirements set for "Engineered Fill Activities" or "Inert Debris Engineered Fill Operations," both of which impose lesser regulatory requirements than those for an "Inert Debris Type A Disposal Facility." See, Title 14, CCR, §§ 17388(g), 17388(l) and fn. 14, above, and fn. 16, below. In addition, it is not clear that the engineer supervised the work in question. Mr. Sherman, Fishback's engineer (or, perhaps, one of them) began work for Mr. Fishback in the spring or summer of ~~2006~~2005. Record, Document 7, Transcript of Administrative Hearing, July 20, 2006, p. 66, ll. 18-23, p. 67, ll. 2-10.

[16] An "Inert Debris Engineered Fill Operation" is "an activity exceeding one year in duration in which only the following inert debris may be used: fully cured asphalt, uncontaminated concrete (including steel reinforcing rods embedded in the concrete), crushed glass, brick, ceramics, clay and clay products, which may be mixed with rock and soil. Those materials are spread on land in lifts and compacted under controlled conditions to achieve a uniform and dense mass which is capable of supporting structural loading, as necessary, or supporting other uses such as recreation, agriculture and open space in order to provide land that is appropriate for an end use consistent with approved local general and specific plans (e.g., roads, building sites, or other improvements) where an engineered fill is required to facilitate productive use(s) of the land. Filling above the surrounding grade shall only be allowed upon the approval of all governmental agencies having jurisdiction. The engineered fill shall be constructed and compacted in accordance with all applicable laws and ordinances and in accordance with specifications prepared and certified at least annually by a Civil Engineer, Certified Engineering Geologist, or similar professional licensed by the State of California and maintained in the operating record of the operation. The operator shall also certify under penalty of perjury, at least annually, that only approved inert debris has been placed as engineered fill, and specifying the amount of inert debris placed as fill. These determinations may be made by reviewing the records of an operation or by on-site inspection. Certification documents shall be maintained in the operating records of the operation and shall be made available to the EA during normal business hours. Acceptance of other Type A inert debris or shredded tires pursuant to Waste Discharge Requirements prior to the effective date of this Article does not

17388.2(a)(3). They, too, must be constructed to certain engineering standards. Id. Mr. Fishback's erosion control work did not conclude within one year from its commencement. It is unknown whether the work satisfies the engineering requirements or the other regulatory requirements for the exemption.

Accordingly, the regulations do not exempt the disposal activities at the Fishback property. Assuming for the moment that the regulations apply,[17] what requirements do they impose on Fishback? Based on the information in the Record describing the activities at the site, Fishback owns and operates an "Inert Debris Type A Disposal Facility."[18] Title 14, CCR, § 17388(m). As such, he is required to obtain a Registration Permit and to comply with specified requirements. Title 14, CCR, § 17388.4. Those requirements include, among others:

1. Obtain waste discharge requirements or establish exemption from the requirements from the Regional Water Quality Control Board;
2. Submit to monthly inspections by the LEA;
3. File a Disposal Facility Plan;
4. Comply with closure and postclosure maintenance requirements;
5. Maintain and file disposal reporting records;
6. Comply with specified State Minimum Standards;
7. Maintain records of the weight of materials disposed. (See, Title 14, CCR, § 17388.4.)

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preclude an activity from being deemed an inert debris engineered fill operation, provided that the operation meets all the requirements of this Article once it takes effect. Where such materials have been deposited, the operator must specify in the operation plan the type of waste previously accepted, a diagram of the fill area, and estimations of the depth of the fill material previously accepted…" Title 14, CCR, § 17388(l).

[17] Fishback argues in his appeal, among other things, that his erosion control work is wholly outside of CIWMB regulation because he is not "disposing" "solid waste." Those arguments will be discussed in the next section of this Staff Report.

[18] An "Inert Debris Type A Disposal Facility" is "a site where only Type A inert debris is disposed to land…" The definition expressly excludes "Inert Debris Engineered Fill Operations." Title 14, CCR, § 17388(m).

After it has received a complete and correct application, the LEA must hold an informational public hearing on the proposed facility. Title 14, CCR, § 17388.6.

Given the general nature of the activities at the Fishback property, it may be possible for Fishback to qualify his erosion control work as an "Inert Debris Engineered Fill Operation," as defined at Title 14, CCR, § 17388(l). (See fn. 16, above.) An Inert Debris Engineered Fill Operation, in sum, is an activity lasting more than one year in which inert debris of the sort Fishback disposes on his property is spread on land in lifts and is compacted under controlled conditions to create a surface that can safely support appropriate end uses, consistent with local planning, including such uses as agriculture where engineered fill is necessary to facilitate the productive use of land. The fill must be constructed in compliance with local requirements and in accord with specifications prepared and certified at least annually by a civil engineer or similar professional licensed by the State. Title 14, CCR, § 17a388(l).

The advantage to such a designation would be substantial from Mr. Fishback's perspective, in that such an operation requires only an EA Notification, not a solid waste facilities permit. (An EA Notification is simply a notice to the LEA, together with specific information and documents, that the operator intends to undertake an activity authorized in Board regulations. See, Title 14, CCR, §§ 18103-18103.3.) Among others, the inert debris disposal regulations set the following requirements for Inert Debris Engineered Fill Operations:

1. Obtain waste discharge requirements or establish exemption from the requirements from the Regional Water Quality Control Board;
2. Submit to quarterly inspections by the LEA;
3. File an Operation Plan which describes the proposed disposal activity (see Title 14, CCR, § 17390);
4. Comply with specified State Minimum Standards;

5. Report the weight of materials disposed (however, the operator is not subject to the Board's disposal reporting system or to the disposal fee applicable to other solid waste disposal).

6. Comply with certain closure requirements. (See Title 14, CCR, § 17388.3.)

There are also record-keeping requirements. Title 14, CCR, § 17389.

B. RESPONSE TO ARGUMENTS RAISED BY FISHBACK IN HIS APPEAL[19]

As a preliminary matter, please note that this Staff Report does not separately address arguments made by the LEA in the hearing before the Hearing Officer. For the most part, and in every respect material to this appeal, staff concurs with arguments made by the LEA.[20] Hence, calling out those arguments would be redundant and is not necessary. Suffice it to say that, based on the LEA's pleadings submitted to the Hearing Officer, Board staff and the LEA are in agreement.

1. The Material Fishback Uses at His Property for the Purposes of Erosion Control Is "Solid Waste."

Fishback's principal argument is that the material he uses at his property for purposes of erosion control is not "solid waste," and, therefore, is not regulated by the LEA or Board. Record, Document 3, Appellant's Brief, pp. 8-12. At the outset, note that the Legislature, in enacting the IWMA and setting forth the responsibilities and powers of the Board, has broadly defined "solid waste" as "...all putrescibles and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse,...demolition and construction wastes,...and other discarded solid and semisolid wastes." PRC § 40191(a). The Board's regulations governing the

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[19] Recall that this matter is being submitted by the parties on the basis of the Administrative Record. Thus, the parties' arguments set forth in this Staff Report are those they raised before the Hearing Officer.

[20] The LEA's legal arguments are found at Record, Document 2, LEA Response to Appeal Filed by Wayne Fishback, pp. 3-9, together with supporting documentation; Record, Document 4, LEA Reply Brief, dated August 29, 2006, pp.3-25, excluding exhibits which the Hearing Officer elected not to consider (see Record, Document 7, Transcript of Administrative Hearing, August 31, 2006, pp. 176, 179); Record, Document 6, LEA Closing Brief,

disposal of construction and demolition waste and inert debris reiterate that definition. Title 14, CCR, § 17388(u).

Fishman bases his argument on the California Supreme Court's ruling in Waste Management of the Desert, Inc. v. Palm Springs Recycling Center, Inc, 7 Cal. 4th 478 (1994). (A copy of this case is provided at Record, Document 3, Appellant's Brief, Tab 11, pp. 230-248.) In that case, the Court interpreted a franchise agreement to determine whether the franchise hauler had an exclusive right to collect recyclables along with solid waste. The Court held that recyclable materials that have value in the marketplace are not "solid waste" until the owner of the recyclables discards them, for example, by placing them in the franchisee's garbage can. Waste Management, 7 Cal. 4th at 484. Even though Waste Management had a contract right to collect all solid waste, recyclable materials that commercial establishments sold to a recycling center had not been discarded, and, therefore, were not "waste" subject to the franchise agreement. Waste Management, 7 Cal. 4th at 488.

Fishback cites this case in support of his argument that the inert debris in question is not "solid waste," so is not subject to Board oversight. Fishback argues that because the inert debris in question has some value to him (i.e., its utility as fill for erosion control), it is not solid waste. If the material is not solid waste, Fishback argues, his use of the material is not subject to the IWMA and LEA and Board regulation. Record, Document 3, Appellant's Brief, p. 9.

The Supreme Court's decision does not support the legal argument Fishback makes in his brief. Fishback states that the Supreme Court held that: "if something has value, is not discarded by the owner but is reused or recycled, then it is not 'waste' and not subject to the Integrated Waste Management Act." Id. That is one of the Court's determinations. However, Fishback misses the point of the Court's decision and draws the wrong conclusion from it. The focus of the decision was whether the recyclable materials in question had been discarded by their owners. If the owners did not discard the materials, they did not become solid waste

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dated September 18, 2006, pp. 11-19; and Record, Document 7, Transcripts of Administrative Hearings on July 20,

subject to the franchise agreement or the IWMA. The determining factor in the Court's decision was not, as Fishback asserts, whether the material was ultimately reused or recycled; it was whether the material was discarded, and hence became a solid waste.

The Court held that a material, recyclable or not, only becomes waste when its owner discards it. If the owner sells an item, it does not enter the solid waste stream. Waste Management, 7 Cal. 4th at 489. The Court's holding does not apply to the facts of Fishback's conduct because the owners of the inert debris in question – the persons whose construction work generated the debris – have, in fact, discarded it. They have not sold it to Fishback for valuable compensation.

The key issue for the Court in Waste Management is whether the recyclables that the persons sold to the recycling center had been discarded. Waste Management, 7 Cal. 4th at 484. In the words of the Court :

> "If the owner sells his property – that is, receives value for it – the property cannot be said to be worthless or useless in an economic sense and is thus not waste from the owner's perspective. Conversely, if the owner voluntarily disposes of the property without receiving compensation or other consideration in exchange – that is, throws it away – the obvious conclusion is that the property has no economic value to the owner. The concept of value is in this sense related to the manner in which the property is disposed of." Waste Management, 7 Cal. 4th at 485 (emphasis added).

> "The proper rule is this: If the owner of property disposes of it for compensation – in common parlance, sells it[21] – it is not waste because it has not been discarded." Waste Management, 7 Cal. 4th at 488.

In the Fishback case, there is no evidence that the homeowners who pay contractors or haulers to remove inert debris from their properties place a value on it, nor is there evidence they receive compensation for it. Indeed, it is most likely that the material in question has a negative value; that is, the homeowners had to pay people to remove the waste created by the construction on their property. For his part, Fishback asserted in his verified brief that he had never accepted

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2006 and August 31, 2006.

[21] The Court also recognizes that donating valuable material, as well as selling it, prevents the material from being considered to be solid waste. Waste Management, Inc., 7 Cal. 4th at 487, 489.

payment from anyone for the deposit of the inert debris at his property. Record, Document 3, Appellant's Brief, p. 4. Accordingly, if it has value to him, that is not value for which he compensated the persons who generated and owned the inert debris in question, or who hauled the debris. There is no evidence in the Record that the homeowners and others who had construction work done on their property received payment for the inert debris generated by their construction work or received a discount to reflect the contractor's reduced demolition costs. Absent the receipt of compensation, the homeowners are deemed to have discarded the waste debris that their construction projects generated. In keeping with the Court's ruling, the material Fishback has caused to be deposited at his property is "solid waste," and is subject to appropriate Board regulation.

This determination is consistent with a reasonable interpretation of the scenario described in Fishback's pleadings. Extrapolating from the pleadings and evidence in the Record, it appears that commercial haulers (who most likely subcontract with construction contractors) receive monetary compensation to remove construction debris from construction sites, in particular "dirt, fully cured concrete, stucco, and brick" (Record, Document 3, Appellant's Brief, p. 3) that is generated by the "demolition of patios, driveways, sidewalks or swimming pool excavations." (Record, Document 3, Appellant's Brief, p. 13) Rather than deliver this material to a recycling facility, at which the hauler would likely have to pay a tipping fee, or the local landfill, at which the hauler would likely have to pay a substantially higher tipping fee, the hauler delivers it to the Fishback property and disposes it at no cost.[22] Record, Document 3, Appellant's Brief, p. 4. Fishback gets inert debris he wants for erosion control and the haulers save substantially on their disposal costs. The owners of the inert debris, however, have not received any compensation for having "sold" the inert debris (nor have they "donated" a valuable commodity since they do not perceive the debris has any value). Not having received value, the property owners have

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[22] Fishback alleges that it costs approximately $400 to dispose a load of construction debris at landfills in Ventura County, and that its costs approximately $100 per load to deliver the material to an aggregate recycling facility. Record, Document 3, Appellant's Brief, p. 16, fn. 2.

discarded the material from their job sites, it has entered the waste stream, and, as solid waste, it is properly subject to regulation under the IWMA. Waste Management, 7 Cal. 4th at 489.[23]

The Board has dealt with numerous sites over that past ten years where property owners claimed they were using otherwise waste materials for the benefit of their properties or for future reuse. In each of the cases, the Board determined that the wastes were, in fact, illegal disposal sites, notwithstanding the benefits claimed by property owners. In San Bernardino County, a property owner caused construction debris and green waste to be deposited on his property to protect his land from occasional flood waters (the Cajon illegal disposal site). Property owners in Sonoma County used waste tires to protect their lands from erosion (Sonoma waste tire sites). Materials having some value if processed were found to be illegally disposed solid wastes when property owners failed to process them as required by Board regulations (the Filbin site in San Luis Obispo and the La Montana site in Los Angeles County).

2. The Fact That the IWMA Requires Diversion of Solid Waste from California's Landfills and That the Board and Ventura County Encourage Recycling of Inert Debris Does Not Exempt Fishback from Regulation for His Solid Waste Disposal Activities.

In his brief before the Hearing Officer, Fishback next asserts that, under the language of the IWMA itself, the "reuse" activities he carries out by depositing the Type A Inert Debris on his property are exempt because they are not "disposal." Record, Document 3, Appellant's Brief, p. 9-11. Fishback fails to cite a statute or regulation supporting his conclusion. Indeed,

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[23] Accord, City of San Marcos v. Coast Waste Management, Inc., 47 Cal. App. 4th 320, 326-327 (1996) (a person who pays to have someone collect his or her recyclables has, in effect, discarded those recyclables by disposing of them without having received compensation, even if the person has merely avoided some of the cost it would otherwise have had to pay to the franchise solid waste collector); Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc., 91 Cal. App. 4th 678 (2001) (by paying to have construction and demolition material removed from jobsites, the generator of the material has discarded it, and therefore it is solid waste under the IWMA).

there is none. Instead, Fishback refers to CIWMB web pages.[24] Record, Document 3, Appellant's Brief, Tab 12, pp. 251-253. It goes without saying that Board web pages are not enforceable as law, unless they reflect statutes or regulations. Accordingly, Fishback points to no legal authority for the proposition he submits.

More to the point, however, the fact that the Board mandates diversion and encourages reuse and recycling does not mean that the disposal of solid waste is unregulated. In essence, Fishback argues that solid waste is diverted when a person deposits the waste on his or her property for some self-defined beneficial use, and that such "diversion" is consistent with statue and regulation. That is not diversion, however, unless it is done in compliance with law and regulation; it is, instead, the illegal disposal of solid waste. If Fishback's legal theory were correct, we would soon find many unregulated solid waste disposal sites being presented as

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[24] Although not cited by Fishback, the web pages to which he refers are "Reuse: The Heart of Waste Prevention" (http://www.ciwmb.ca.gov/Reuse/) and a web page in the Board's "Waste Prevention World" (http://www.ciwmb.ca.gov/WPW/Define.htm#Reuse) where the Board provides definitions to many of the words and terms used in connection with waste prevention. There, "reuse" is defined as:

> **"Reuse**—Using an object or material again, either for its original purpose or for a similar purpose, without significantly altering the physical form of the object or material.
>
> "Reuse is not recycling, because recycling alters the physical form of an object or material. Reuse is generally preferred to recycling because reuse generally consumes less energy and resources than recycling. Waste is defined as material for which no use or reuse is intended. Thus, reuse prevents objects and materials from becoming waste. Therefore, reuse is considered to be a form of waste prevention. Examples of reuse follow. To learn more about reuse, consult the CIWMB Reuse Web site.
>
> - At Home—Wash and reuse your plastic food bags. Buy reusable plastic storage containers to store leftover food, and to store foods that you buy in bulk. Consult material exchanges to purchase used items or to find new homes for items that you no longer need. If you remodel your home, consider using reused building materials, and send demolition materials that you create for reuse. Bring a reusable coffee mug or commuter mug with you when you buy coffee drinks. (Starbucks reported that customers used their own commuter mugs, and received a $0.10 discount, approximately 12.7 million times in 2002. This prevented an estimated 550,000 pounds of paper waste.)
> - In Business—Purchase "recycled" ink and toner cartridges for your printers and photocopiers. Have the tires on your cars retreaded when the tread is worn, but the tire is otherwise reusable.
>
> "One exception to the normal preference of reuse to the purchasing new items might be some appliances. It is often environmentally preferable to replace very old refrigerators, clothes washers, clothes dryers, or central heating and air conditioning units with new appliances if given a choice between repair and replacement, because the amount of energy (and water, in the case of clothes washers) used to operate some older appliances is substantially more than the amount used to operate new appliances. Of course attempts should be made when replacing appliances to have the metal in the discarded appliances recycled."

diversion and reuse, and their owners would be claiming that they are exempt from Board regulation.

3. Fishback's Use of Inert Debris Is Not Exempt from Regulation by Virtue of Section 17380(g) of the Board's Regulations.

Fishback asserts that his use of "construction and demolition materials," such as the Type A Inert Debris he causes to be deposited at his property, is expressly exempted from Board regulation pursuant to Title 14, CCR, § 17380(g). Record, Document 3, Appellant's Brief, pp. 12-14. Section 17380 does not apply to the activities at the Fishback property. That section is part of the Board's "Construction and Demolition and Inert Debris Transfer/Processing Regulatory Requirements" which govern the transfer and processing of construction and demolition debris and inert debris. Title 14, CCR, §§ 17380 – 17386. Fishback is not transferring or processing inert debris; he is disposing it by depositing it finally onto land.[25]

Indeed, even if the regulation did apply to disposal activities, it would not apply to the activities at Fishback's property. Section 17380(g) sets out an exemption for persons "who generate C&D [i.e., construction and demolition] debris or inert debris in the course of carrying out…construction work…at the site of the construction work…," or to persons who own the property on which the construction work occurs. (Emphasis added.) The section is directed to the construction process and provides that the persons who generate C&D debris or inert debris during construction and the persons who own the property where the construction occurs are not considered to be engaged in the transfer or processing of C&D debris or inert debris. (Thus, the contractors who demolish the swimming pools and sidewalks that are ultimately disposed at Mr. Fishback's property, and the homeowners where the demolition work occurred, are not regulated as C&D or inert debris transfer/processing facilities or operations.) The regulation is not directed at persons, such as Mr. Fishback, who handle and dispose waste on property that is not

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[25] 14 CCR § 1738(e); PRC § 40192.

the site of the construction work which generates the debris in the first place. Clearly, Fishback does not generate the inert debris he utilizes; it is generated off-site and is delivered to his property for disposal. See, e.g., Record, Document 3, Appellant's Brief, pp. 13-14.

4. Fishback's Use of Inert Debris Is Not Exempt from Regulation by Virtue of Section 17402.5(c)(8) of the Board's Regulations.

Fishback also asserts that his erosion control work is exempt from Board regulations pursuant to Title 14, CCR, Section 17402.5(c)(8). Record, Document 3, Appellant's Brief, p. 13. The regulation that Fishback cites does not apply to inert debris transfer/processing or disposal facilities and operations. The regulation is found in Article 6.0, "Transfer/Processing Operations and Facilities Regulatory Requirements," which sets out the tiered permit requirements for transfer/processing stations which handle municipal solid wastes. See, Title 14, CCR, §§ 17400-17405. Section 17400(a) expressly states that the regulatory tiers established in the article do not apply to activities subject to regulation under other provisions of Chapter 3. The handling and disposal of construction and demolition debris and inert debris are regulated under Articles 5.9 and 5.95 of Chapter 3 (commencing at Sections 17380 and 17387, respectively).

Moreover, Section 17402.5 does not establish definitions and exclusions that apply generally. Section 17402.5(a)(2) states that "the definitions and related provision of this section are for use only to determine the applicability of Articles 6.0, 6.1, 6.2, 6.3 and 6.35 of this Chapter." Accordingly, the definition found in subdivision (c)(8) of Section 17402.5 does not apply in Article 5.95, where inert debris disposal is regulated.

Finally, even if Section 17402.5 did apply to Fishback's operation, he would not qualify as a "Reuse Salvage Operation." Title 14, CCR, § 17402.5(c)(8). Such an activity accepts source-separated material and recovers distinct materials for recycling or reuse. Examples include dismantlers of furniture, mattresses, electronic equipment, and the like. Id. Persons who run Reuse Salvage Operations sell the recovered materials or use them for making new products. Unlike dismantlers, Fishback does not extract valuable recyclables from the Type A

Inert Debris he receives and deliver them for further reuse or recycling, nor does he process them into valuable commodities. He disposes them, or, from his perspective, deposits them on land in a manner intended to protect his property from erosion. That is not the kind of activity the Board authorized by creating the exemption from the transfer/process regulations for Reuse Salvage Operation. If it were, persons could take any source-separated waste stream, such as waste tires or organic material, and bury it on their property for some arguably beneficial use totally free from regulatory oversight. The public health and safety and environmental harms from such unregulated activities are clear.

5. Ventura County's HECO Ordinance Does Not Preclude Enforcement of the Integrated Waste Management Act.

Fishback argues that Ventura County's Hillside Erosion Control Ordinance ("HECO") somehow preempts LEA and CIWMB regulation. Record, Document 3, Appellant's Brief, p. 14. Fishback cites no legal authority for this proposition, and, indeed, there is no such authority. Otherwise valid local ordinances that are not in conflict with the general law of the State are enforceable in accordance with their own terms. When there is a conflict, the question is whether the State has preempted the local law, not whether the local ordinance preempts State law. See, e.g., Candid Enterprises, Inc. v. Grossmont Union High School District, 39 Cal. 3d 878, 885-886 (1985).

It goes without saying that State law and local ordinances may operate simultaneously, requiring a property owner to comply with both regulatory schemes, as long as they are not inherently inconsistent, duplicative or in a subject area fully occupied by the general State law. Candid Enterprises, Inc., 39 Cal. 3d at 885. In Candid Enterprises, Inc., the Court upheld a local ordinance that imposed school fees on new development because such an ordinance was not preempted by State law. Candid Enterprises, Inc., 39 Cal. 3d at 887. If an inconsistency between State and local law occurs, the courts must determine whether the State law has preempted the conflicting local ordinance.

It is common for State and local laws to apply to a single project. A very simple example is a development project that is subject to local land use laws as well as State laws and regulations governing environmental protection, air quality, water quality, among others. HECO is an example of a local ordinance that addresses local concerns (including erosion on agricultural lands). The IWMA, on the other hand, regulates the handling and disposal of solid waste. There is no inherent inconsistency between the regulatory schemes. A property owner must simply comply with both. If Fishback wants to control erosion at his property by means of a HECO plan, he cannot use solid waste as a construction material unless he also complies with the Board's regulations. The Legislature has made this explicit:

> "This division [i.e., the IWMA], or any rules or regulations adopted pursuant thereto, is not a limitation on the power of a city, county, or district to impose and enforce reasonable land use conditions or restrictions on solid waste management facilities in order to prevent or mitigate potential nuisances, if the conditions or restrictions do not conflict with or impose lesser requirements than the policies, standards, and requirements of this division and all regulations adopted pursuant to this division." PRC. § 40053.

Further, the Board's regulations governing the disposal of inert debris make it clear that compliance with State requirements does not preempt any other public agency's requirements, unless they are "inconsistent" with, that is, in conflict with, Board regulations:

> "(c) Nothing in this Article [5.95] limits or restricts the power of any…local agency to enforce any provision of law that it is authorized or required to enforce or administer, nor to limit or restrict local governments from promulgating laws which are as strict or stricter than the regulations contained in this Article. However, no local government may promulgate laws which are inconsistent with the provisions of this Article.
>
> (d) No provision in this Article [5.95] shall be construed as relieving any owner or operator from obtaining all required permits…and complying with all orders, laws, regulations, reports, or other requirements of other regulatory or enforcement agencies, including…local health agencies,…[and] local land use authorities…" Title 14, CCR, § 17387(c), (d).

6. <u>The LEA Is Not Discriminating against Fishback Such That Its Cease and Desist Order Against Fishback Is Void or Otherwise Unfair.</u>

Fishback argues that it is somehow unfair for the LEA to take enforcement action against him when, he alleges, the LEA is not taking comparable enforcement action against three other

persons in Ventura County who have undertaken erosion control projects similar to Fishback's. Record, Document 3, Appellant's Brief, pp. 20-21. Fishback complains that the other sites, although "they have been erroneously classified as solid waste disposal projects by [the LEA]," have been found to be excluded from Board regulation, whereas Fishback's project requires a Registration permit. Record, Document 3, Appellant's Brief, pp. 20.

Firstly, it does not appear from the Record that Fishback has attempted to qualify his activity for an exemption or an EA Notification. Moreover, Fishback provides no evidence to support his claim that he is being treated unfairly and no evidence to show that the other solid waste disposal activities are not being properly regulated by the LEA. The evidence Fishback introduced shows that the LEA found that two property owners were carrying out engineered fills to be completed within one year and were thus exempt, provided they complied with the regulations' requirements. Record, Document 3, Appellant's Brief, Tab, 17, pp.320-324. The LEA issued a Cease and Desist Order to a third property owner. Record, Document 3, Appellant's Brief, Tab, 17, pp.325-326. The LEA found the fourth property owner could qualify as an Inert Debris Engineered Fill Operation, provided it complied with the Board's regulations and submitted the required EA Notification with documentation. Record, Document 3, Appellant's Brief, Tab, 17, pp. 327-328.

Laws are to be applied equally to all persons similarly situated. The equal protection clause of the Fourteenth Amendment of the U.S. Constitution is "essentially a direction that all persons similarly situated be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). The equal protection clause protects against application of a law by a public agency in an unequal manner, resulting in discriminatory treatment, even when the law is impartial on its face. City of Banning v. Desert Outdoor Advertising, 209 Cal. App.2d 152 (1962).

Since Fishback is not claiming to be a member of any particular protected class (e.g., a minority ethnic group) to which the courts accord heightened scrutiny under the equal protection clause, he would be treated as a "class of one" for purposes of an equal protection claim. See,

Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). The Ninth Circuit elaborated on this holding in the case of Squaw Valley Development v. Goldberg, 375 F.3rd 936, 944 (9th Cir. 2004). The court in Squaw Valley stated that where "state action does not implicate a fundamental right or a suspect classification, the plaintiff can establish a "class of one" equal protection claim by demonstrating that it "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Id. at 544 (quoting Willowbrook, 528 U.S. at 564). Further, "[w]here an equal protection claim is based on 'selective enforcement of valid laws,' a plaintiff can show that the defendants' rational basis for selectively enforcing the law is a pretext for an impermissible motive." Squaw Valley, 375 F.3rd at 944, (quoting Freeman v. City of Santa Ana, 68 F.3d 1180, 1187-88 (9th Cir. 1995)). Pretext can be shown by showing that either: "(1) the proffered rational basis was objectively false; or (2) the defendant actually acted based on an improper motive." Squaw Valley, 375 F.3d. at 946.

First, Fishback has presented no evidence that any of the other activities that are being regulated differently by the LEA are in fact "similarly situated." These other operations may be regulated differently because they are in fact different types of activities, thus being subject to different regulations. Second, even if the other operations are considered to be "similarly situated," Fishback has not presented any evidence to show that the LEA's actions lacked a rational basis. The LEA issued its Cease and Desist Order pursuant to the performance of its standard enforcement duties under certain provisions of the law and regulations covering solid waste facilities. The LEA's actions seem to clearly meet the liberal standards of the rational basis test. Third, Fishback has presented no evidence of pretext. He has not shown that the rational basis for the LEA's enforcement action was objectively false, nor has he presented any evidence that the LEA's action was based on an improper motive. While Fishback alleged that he is being harassed by the LEA, he has not presented any evidence of this harassment, and he has not stated any possible motivation for this harassment.

Accordingly, Fishback has not presented evidence sufficient to meet his burden of proof under the "class of one" equal protection rule.

VII

CONCLUSION

For the reasons stated above, and on the basis of the evidence and arguments submitted to the Board, staff recommends that the Board uphold and affirm the decision of the Hearing Officer.

Date: 11/29/06

Respectfully submitted,

Michael L. Bledsoe, Senior Staff Counsel

EXHIBIT “A”

"Wayne Fishback Operation"

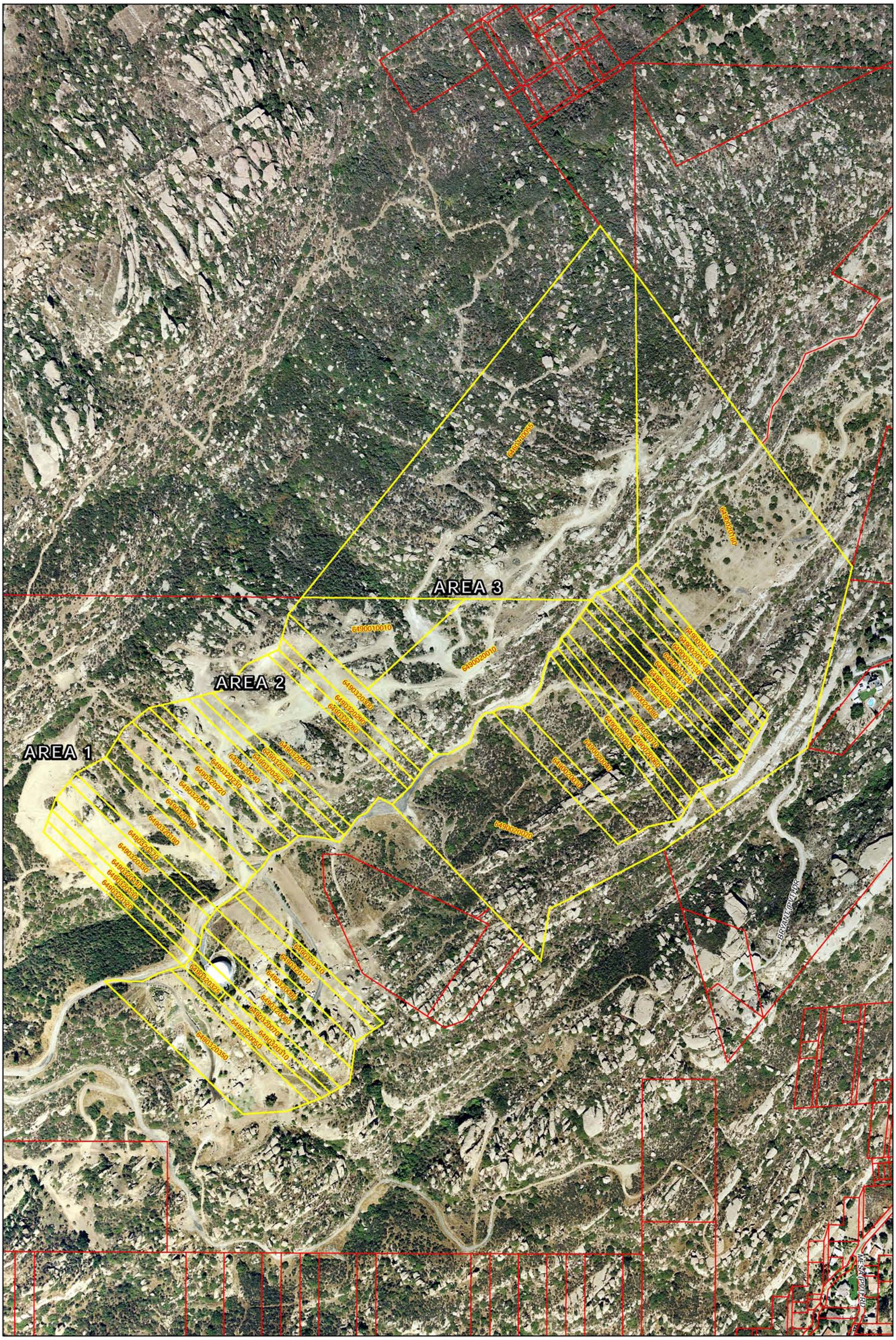
Area 3

"Exhibit 10f"

"Wayne Fishback Operation"

Area 3

"Exhibit 10g"



Ventura County
Resource Management Agency
GIS Development & Mapping Services
09/28/2006
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Source: AirPhotoUSA, September 2005

PARCELS/BASE MAP
AERIAL PHOTOGRAPHY
Exhibit 11

0 200 400 800 Feet

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Disclaimer: this map was created by the Ventura County Resource Management Agency, Mapping Services - GIS, which is designed and operated solely for the convenience of the County and related public agencies. The County does not warrant the accuracy of this map and no decision involving a risk of economic loss or physical injury should be made in reliance therein

EXHIBIT “B”

RESOURCE MANAGEMENT AGENCY

county of ventura

Weights and Measures
Jim Delperdang
Sealer

September 22, 2006

NOTICE OF DECISION

Wayne Fishback
3106 Calusa Avenue
Simi Valley, CA 93063

You are hereby notified that on September 22, 2006 a decision was made in the matter of your appeal of a Cease and Desist Order issued by the Ventura County Local Enforcement Agency (dated May 11, 2006) for alleged violations of Public Resources Code Sections 44001 and 44002(a).

Issues:

When construction and demolition and inert debris from (CDI) are used for the purpose of hillside erosion control is it solid waste? If so, is the property owner required to obtain a solid waste facility permit?

Findings of Fact:

1. Beginning In March 2005, Mr. Fishback allowed material from construction sites (dirt, stucco, brick, fully cured concrete and asphalt) to be deposited on property he owns or controls in the North American Cutoff Road area of unincorporated Ventura County.
2. Ventura County Environmental Health Department (EHD) has been designated as the Local Enforcement Agency (LEA) by the Ventura County Board of Supervisors.

Discussion:

The Public Resources Code (Section 40191(a)) defines solid waste as "all putrescible and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, **demolition and construction wastes**, abandoned vehicles and parts thereof, discarded home and industrial appliances, dewatered, treated or chemically fixed sewage sludge which is not hazardous waste, and other discarded solid and semisolid wastes" (emphasis added). Construction and demolition and inert debris are specific types of solid waste.

800 South Victoria Avenue, L# 1750, Ventura, CA 93009 (805) 654-2444 Fax (805) 654-5177

Mr. Fishback contends that he is reusing, recycling or diverting construction and demolition and inert debris (CDI) from the waste stream for hillside stabilization on his property therefore it is not solid waste. The Natural Resources Code (CCR Title 14, Division 7, Chapter 3, Article 5.9, Section 17381) defines "separated for reuse" as materials, including commingled recyclables, that have been separated or kept separate from the solid waste stream for the purpose of additional sorting or processing those materials for recycling or reuse in order to return them to the economic mainstream in the form of raw material for new, reused, or reconstituted products which meet the quality standards necessary to be used in the marketplace, and includes materials that have been source separated. The Public Resources Code (Section 40180) defines "recycle" as the process of collecting, sorting, cleansing, treating, and reconstituting materials that would otherwise become solid waste, and returning them to the economic mainstream in the form of raw material for new, reused, or reconstituted products which meet the quality standards necessary to be used in the marketplace. As these materials are not being returned to the economic mainstream I don't find that the use of CDI for hillside stabilization to be reuse or recycling as defined in statute. Natural Resources Code (CCR Title 14, Division 7, Chapter 3) Article 5.95 governs the disposal of solid waste (CDI).

The primary issue settled in the Waste Management of the Desert vs. Palm Springs Recycling Center case was whether exclusive franchise agreements between cities and waste haulers permitted by the California Integrated Waste Management Act of 1989 prohibited the sale of recyclable materials by their owner to someone other than the exclusive franchisee. The meaning the appellant in the Fishback matter wants to ascribe to the Waste Management case is that something is not waste until the person who possesses it discards it with the intention of it going to a landfill. The CDI going to the Fishback property is not recycled or reused material by definition and therefore is solid waste.

If utilizing solid waste (CDI) for hillside stabilization is not reuse or recycling, is it disposal? The Natural Resources Code (CCR Title 14, Division 7, Chapter 3, Article 5.95, Section 17388) defines "disposal" as "the final deposition of C&D waste or inert debris on land". I find this definition to most closely fits the facts in this matter and that Mr. Fishback is disposing of solid waste on his property.

Mr. Fishback claims to be exempt from Solid Waste Disposal Permit requirements based on Natural Resources Code (Title 14, Division 7, Chapter 3, Article 5.9) Section 17380(g): "This article does not apply to persons who generate C&D debris or inert debris in the course of carrying out construction, remodeling, repair, demolition or deconstruction of buildings, roads and other structures (collectively, "construction work") at the site of the construction work or to persons who own the land, buildings and other structures that are the object of the construction work, provided that such persons do not accept at the site any C&D debris or inert debris that is used in the construction work, to remain on the site of the construction work after the construction is completed. For example,

public works agencies constructing roads and bridges, road repair, airport runway construction, bridge and roadway work, levee work, flood control work, or landslide debris cleanup, and public or private contractors demolishing or constructing buildings are not subject to these regulations during the course of the construction work." This portion of the statute applies only to transfer and processing activities as further defined in NRC Section 17381.1 (d) and (e). These materials were not brought to the Fishback property for further transfer or processing, rather are there for final deposition. Thus their deposition is governed by NRC (CCR Title 14, Division 7, Chapter 3) Article 5.95.

The requirement to be permitted as a Solid Waste Disposal facility does not conflict with the HECO (Hillside Erosion Control Ordinance. Mr. Fishback can continue to accept CDI at the subject property for the purpose of hillside stabilization provided he obtains a Solid Waste Disposal Permit from the LEA. Complying with the HECO plan and the Public Resources Code requirements for Solid Waste Disposal Permitting does not present any statutory conflicts, they are not mutually exclusive.

While the disparate treatment argument is not relevant to my ruling in this matter, Public Resources Code Section 44307 states "The enforcement agency shall also hold a hearing upon a petition to the enforcement agency from any person requesting the enforcement agency to review an alleged failure of the agency to act as required by law or regulation. A hearing shall be held in accordance with the procedures specified in Section 44310." Mr. Fishback has recourse if he feels the LEA has failed to act consistently with respect the application of Solid Waste Disposal Permit statutes to other matters.

Decision and Right to Appeal:

My decision is to uphold the Cease and Desist Order issued to Wayne Fishback by the LEA on May 11, 2006. This decision may be appealed to the Superior Court by filing a writ of mandate pursuant to section 1094.5 of the Code of Civil Procedure. Any such petition shall be filed with the court no later than thirty (30) days or the appeal shall be barred. A writ of mandate proceeding shall be the aggrieved person's exclusive appellate remedy.

Jim Delperdang
Hearing Officer